



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 07, 2022

IN THE MATTER OF:

Appeal Board No. 624863

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 624863, 624864 and 624865, the claimant appeals from the decisions of the Administrative Law Judge filed July 19, 2022, insofar as they denied the claimant's application to reopen A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688 and continued in effect the initial determinations holding the claimant ineligible to receive benefits, effective March 23, 2020 and until the reason for the ineligibility no longer exists, on the basis that the claimant was not capable of work; charging the claimant with an overpayment of \$13,104 in benefits recoverable pursuant to Labor Law § 597

(4); charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of \$18,600 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Pandemic Emergency Unemployment Compensation of \$20,664 recoverable pursuant to Section 2107 (e)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance benefits of \$1,800 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and reducing the claimant's right to receive future benefits by 80 effective days and charging a civil penalty of \$7,855.20 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by and on behalf of the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: On November 8, 2021, the claimant requested a hearing on the determinations herein. He did not know when a hearing might be scheduled. On December 5, the claimant left for Bangladesh to visit his elderly mother with plans to return to New York on February 1, 2022. While he was in Bangladesh, the claimant could not receive telephone calls from New York on his cell phone.

By hearing notice dated December 29, 2021, a telephone hearing on the issues herein was scheduled for Wednesday, January 12, 2022 in A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688. The hearing notice was delivered to the claimant's home address. Although the claimant's wife remained in New York while the claimant was abroad, she did not check the claimant's mail while he was away. As a result, the claimant was unaware that a hearing had been scheduled. Default decisions were issued in A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688. When the claimant returned to New York on February 1, 2022, he opened his mail which included the hearing notice and the default decisions. By letter dated February 2, 2022, the claimant applied to reopen A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688.

OPINION: The credible evidence establishes that the claimant failed to appear at the hearing held on January 12, 2022, because he was out of the country. The claimant's credible and uncontroverted testimony establishes that he travelled to Bangladesh to visit his elderly mother on December 5, 2021 and remained there through February 1, 2022. His testimony further establishes that he was unable to receive calls on his cell phone from New York while in Bangladesh. As the claimant could not appear at the hearing, either in person or by telephone, while he was out of the country, he has established good cause for the failure to appear. The evidence further establishes that the claimant applied to reopen the matters the day after his return to New York.

We do not find the fact that the claimant made no arrangements to check his mail while he was away to be dispositive. Although the claimant was aware that he could request a hearing on these matters, the record is devoid of evidence that he was advised in any way of when a requested hearing might be scheduled. Consequently, the claimant had no reason to believe that a hearing would be scheduled while he was out of the country. Since the claimant was unable to appear at the hearing because he was out of the country and applied to reopen the matters in a timely fashion, he has demonstrated good cause for the failure to appear (see, *Matter of NY Loves Yoga, LLC*, 190 AD3d 1168 (3d

Dept 2021)). Accordingly, the claimant's application to reopen A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688 is granted.

However, our review of the record reveals that the matters should be remanded to hold a hearing on the underlying issues in these matters. The record was not developed with respect to the initial determinations of capability of employment, recoverable overpayment, and willful misrepresentation to obtain benefits because the Judge found there was no good cause to grant the claimant's application to reopen A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed from, are reversed.

The claimant's application to reopen A.L.J. Case Nos. 021-49685, 021-49686 and 021-49688 is granted.

The decisions of the Administrative Law Judge, insofar as they continued in effect the determinations of capability of employment, recoverable overpayment, and willful misrepresentation to obtain benefits, are rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the cases shall be, and the same hereby are, remanded to the Hearing Section to hold a hearing on the issues of capability of employment, recoverable overpayment, and willful misrepresentation to obtain benefits, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issues of capability of employment, recoverable overpayment, and willful misrepresentation to obtain benefits, only, upon due notice to all parties and their representatives, and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issues of capability of employment, recoverable overpayment, and willful

misrepresentation, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

JUNE F. O'NEILL, MEMBER